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No. 476

In the Supreme Court of the United States

OCTOBER TERM, 1970

SHELDON G. PERLMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Now comes the Petitioner, Sheldon G. Perlman, and replies to the brief for the United States in opposition as follows:

1. NO PROOF WAS MADE THAT A WRITTEN ORDER FORM AS REQUIRED FOR THE TRANSFER OF MARIJUANA WAS NOT GIVEN TO THE TRANSFERORS.

In Point 2 of the brief in opposition, the government stated that petitioner Perlman and co-defendant Dalton

were partners in crime. This was not the evidentiary showing made when the case was tried, because there appeared to be, according to the evidence, a transfer of marijuana from Perlman to Dalton, and a second and separate transfer from Dalton to agent Bottorff.

The government does not dispute, and in fact **ADMITS**, that proof at trial did not show that Bottorff did not give to Dalton any order form for the transfer of marijuana (Gov. Br. p. 5). But it was Dalton who transferred the substance to the agent—and not Perlman. The government admits that proof was necessary, but suggests that,

> "... the evidence as a whole was sufficient to permit the trier of facts to infer that petitioner never obtained directly from Bottorff, or indirectly through Dalton, an order form."

The suggested inference here cannot substitute for proof which was required to be made:

> "No statutory presumption aids the government in a prosecution under 4705(a); it must prove affirmative that no order form passed in order to secure a conviction." Brief for the United States, pp. 9-10, in *Minor* v. *United States*, 396 U.S. 87 (1970); reprinted in L. Reprints, Criminal Law Series, Vol. I, No. 5, 1969 (1970 Term).

A prosecution under 26 U.S.C. 4742(a) similarly requires affirmative proof that no order form was passed.

In effect, the government confesses its failure to have proven one of the essential requirements before conviction may be had.

As was stated in the petition for this writ, it does not appear that this court has ever decided this question, and it is for this reason we pray certiorari be granted, since it is an issue which occurs frequently.

2. PROOF OF OTHER CRIMES IS PREJUDICIAL WHERE THE CRIME CHARGED HERE WAS NOT AN "INTENT" CRIME.

The crime charged is complete upon a transfer of marijuana without an order form. The government argues (Gov. Br. 5) that proof of an earlier transaction, three months before the transaction charged in the indictment, was necessary because it served as a basis for future dealing. There is no citation of any case supportive of the government's position. No authority interprets the offense here charged as an "intent" crime. Absent this, it was prejudicial to show proof of other crimes. *Michelson* v. *United States*, 335 U.S. 469, 479. See also *Sumrall* v. *United States*, 360 F.2d 311 at 314.

3. THE GOVERNMENT WAS ESTOPPED FROM PROCEEDING WITH THE PROSECUTION AFTER IT PAROLED AND DEPORTED A CRUCIAL PARTICIPATING WITNESS, WITHOUT NOTICE, TO THE COURT OR PETITIONER, WHICH CONCEALED THE FACT AND EFFECTIVELY PLACED THE WITNESS BEYOND SUBPOENA OR OTHER COMPULSORY PROCESS. THE PETITIONER WAS DENIED HIS RIGHT TO CONFRONTATION.

The government in its brief in opposition states that, "there is, however, no evidence that the deportation was part of any scheme to suppress favorable defense evidence" (Gov. Br. 6). This suggestion completely ignores Dalton's letter of July 1, 1966, to Judge Austin which suggests that Dalton possessed evidence to "clear" himself and then suggests that he might be deported. It is interesting to note that the government then did deport him a few months later just before the petitioner's case was to be tried.

The government's argument completely ignores the fact that Dalton may have received an order form from Bottorff.*. Such evidence certainly would exonerate the petitioner and would not be in the petitioner's possession.

4. AT ALL TIMES INVOLVED HEREIN, THE PETITIONER WAS A RESIDENT OF TANGIER, MOROCCO, AND THEREFORE THERE WAS NO JURISDICTION IN THE UNITED STATES COURTS.

The government simply states that the petitioner participated in a crime committed in the United States and is therefore subject to the jurisdiction of its courts. This simple reply and the cases cited ignore the fact that the proof shows that all of petitioner's acts, if any, were in Morocco. In any event, the government's reply points out the conflict between the cases they cite and the cases cited by petitioner and 26 U.S.C. 4744, and therefore this Court should grant certiorari to resolve this conflict.

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* Note that the government's theory is that petitioner and Dalton were partners and as such acted for each other. (Gov. Br. 4-5) Certainly, if Dalton had received a written order form on the official form from Bottorff, even if petitioner never saw, received, or had knowledge of such a form himself, the petitioner would not be guilty of the crime charged under the government's theory of the case.

Remember also that the *government has now admitted* that neither Bottorff nor anyone else ever testified or offered any proof that Dalton did not receive a written order form on the official form. (Gov. Br. 5).

5. THE EVIDENCE WHICH TENDED TO SHOW A TRANSFER OF MARIJUANA BY PERLMAN TO DALTON ONLY, RATHER THAN TO BOTTORFF AS CHARGED, CONSTITUTED A FATAL VARIANCE IN PROOF AND AN UNCONSTITUTIONAL AMENDMENT OF THE INDICTMENT.

The government's answer (Gov. Br. 4-5) ignores the evidence in the case which clearly establishes that the transfer from petitioner to Dalton in March, 1966, was completely unrelated to Bottorff and any transactions in December, 1965. Contrary to the government's answer that the evidence showed that it was understood that Bottorff was to be the transferee, the transaction in March, 1966, stands out as being completely different than previous transactions where Bottorff was the transferee. Bottorff had no knowledge or expectation of any transfer to be made in March, 1966, and there is no showing anywhere that petitioner shared or was to share any of the proceeds from the transfer in March, 1966, by Dalton to Bottorff.

6. THE COURT ADMITTED, OVER OBJECTION, A RECORDING OF AN OVERSEAS TELEPHONE CONVERSATION, WITHOUT SUFFICIENT VOICE IDENTIFICATION, AND ERRONEOUSLY REFUSED TO SUPPRESS SAID RECORDING AS HAVING BEEN OBTAINED IN VIOLATION OF SECTION 605, TITLE 47 U.S.C., AND THE CONSTITUTIONAL RIGHTS OF PERLMAN UNDER WHITE v. UNITED STATES, 405 F.2d 838, A BINDING PRECEDENT UPON THE DISTRICT JUDGE AT THE TIME OF TRIAL.

The government does not respond to the petitioner's contention that the interception and recording was a viola-

tion of State law and that this Court should exercise its supervisory powers and strike down practices of federal agents that violate state criminal felony laws.

No reply is necessary to the answers to the other contentions under this point.

7. THE COURT SHOULD RECONSIDER ITS HOLDING IN BUIE v. UNITED STATES.

The government does not respond to the petitioner's contentions under this point, and thus no reply is necessary.

CONCLUSION

For the foregoing reasons, the Petitioner prays that his Petition for a Writ of Certiorari be granted, and that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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